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NOTE AND COMMENT.

CONCEALING A SECRET TRUST BY MAKING AN ABSOLUTE TESTAMENTARY GIFT TO TESTATOR'S SOLICITOR.—How to effect a testamentary gift to charity, invalid by statute, if made directly to a charitable institution or upon trust, express or implied, for such purpose, is a question of frequent occurrence in the many States that limit the amount or purposes for which property may be devised for charitable ends.

A recent California decision upheld a testamentary gift made to testatrix's solicitor under the following circumstances. Testatrix, the day before the will was drawn, explained to her solicitor "that she wished to leave $200,000" to erect a memorial gate. He expressed doubt of the validity of such a gift, and the next day returned and gave his reasons. She thereupon suggested that he and Mr. Spreckels take the bequest as park commissioners. The solicitor replied that they would take in trust as public officers and the gift would still be void. At her suggestion that they take individually he said, "You can give your property to any one you please, but you cannot make a trust of it." She said she wished to give it absolutely and that they

might "do with it as (they) please." Accordingly, the will was so drawn, leaving the property to the attorney and Mr. Spreckels, and stating that testatrix had abandoned the idea of a memorial gate and left the money without any understanding or trust as to its appropriation. After testatrix's death, these two legatees executed a declaration of trust to appropriate the money to the erection of such memorial gate. A direct bequest for such purpose would have been invalid as to the greater part of the legacy because in California testatrix could not have devised or bequeathed more than a third of her estate to charitable uses, CIVIL CODE 1313. *O'Donnell, et al.* v. *Murphy, et al.* (Dist. Ct. of Appeal, re-hearing denied by Supreme Court, Cal. Feb. 9, 1912), 120 Pac. 1076.

A statute prohibiting charitable bequests cannot be evaded by a secret trust. If such a trust is disclosed by any means, the devise is invalid. 1 JARMAN, WILLS, Ed. 6, 195. Accordingly, the question arises how is a secret trust to be fastened upon a legacy absolute upon its face? In England the point is well determined to be a question of fact, requiring clear proof of two distinct elements. First, did the testator intend that the gift should be appropriated for a charitable purpose? and, secondly, was his intention that the devise should not be taken beneficially known to the devisee and the devise accepted on that footing? *Wallgrave* v. *Tebbs,* 2 K. & J. 313, 4 W. R. 194; *Jones* v. *Badley,* L. R. 3 Ch. App. 364; *McCormick* v. *Grogan,* L. R. 4 H. L. 82, 17 W. R. 961. "The trust springs from the intention of the testator and the promise of the legatee." *Amherst College* v. *Ritch,* 151 N. Y. 282.

If it distinctly appears that the testator preferred to leave the disposal of his property within the discretion of the legatee, there is no ground for the theory of a trust. "Whatever moral obligation there may be, no legal obligation rests upon him." *Amherst College* v. *Ritch, supra.* In *McCormick* v. *Grogan,* above cited, testator devised his entire estate to a friend in whom he had great confidence and left with his will a letter of instructions. The House of Lords decided that the letter of instructions was in the nature of a confidential communication regarding the distribution of the estate, and that the testator at the same time endeavored to invest the devisee "with all his own irresponsibility in carrying them into effect." This decision points out that the testator may express his own idea as to the proper disposition of his property and that such does not necessarily constitute an "intention" that his property must be so disposed of. In *Lomax* v. *Ripley,* 3 Sm. & Giff. 48, it was held, after great consideration, that the fact that the devisee, who was the testator's wife, intended to carry out his desires and purpose (to found a charity) of which she was fully cognizant, did not invalidate the gift because he "refrained by instruction and premeditation from declaring any trust or imposing any obligation or exacting any promise for" the fulfillment of his plan. But in *Pilkington* v. *Boughey,* 12 Sim. 114, an intimation that testator trusted his devise would be disposed of in a manner that he would approve, although the matter was expressly left in the discretion of the trustees, was held sufficient to defeat the gift, because it was shown that the testator desired the building of a chapel in violation of the statute of

mortmain. Testator's intent is in such cases difficult to determine, but usually, as in *Lomax* v. *Ripley,* the court prefers to believe that it is just as the will expresses it, that is, that the gift is absolute. But the difficulty which arises in the principal case is that the will was drawn by the beneficiary, the solicitor.

When the beneficiary knows that the testator intended the property to be applied for purposes other than his own benefit, and "either expressly promises or by silence implies that he will carry the testator's intention into effect and the property is left to him upon the faith of that promise or undertaking, it is in effect a case of trust." *Wallgrave* v. *Tebbs,* above cited. Once testator's intent is communicated to the beneficiary, the point is: did he promise, expressly or impliedly, to carry it into effect? Knowledge of testator's hope or desire is not of itself sufficient. The assent must be enforceable "on the footing of a breach of a promise or engagement. * * * binding on the conscience." *Lomax* v. *Ripley, supra.* In *Tee* v. *Ferris,* 2 K. & J. 357, the will and a memorandum of testator's wishes were read to the legatee and his silence under such circumstances was held to be equivalent to an express assent. *Accord: Springett* v. *Jenings,* L. R. 10 Eq. 488. There is no necessity for a bargain between the testator and the trustee. *Moss* v. *Cooper,* 1 J. & H. 352. The power of a court of equity to prevent fraud authorizes it to fasten a trust upon a testamentary gift secured through the assent of an agent, silence being held equivalent to consent. *In re Stirk's Estate* (Pa. 1911), 81 Atl. 187, 10 MICH. L. REV. 250, *Russell* v. *Jackson,* 9 Hare, 387.

Rowbotham v. *Dunnett,* L. R. 8 Ch. D. 430, supports the principal case. There an absolute gift was made to testatrix's solicitor, who had advised his client that a direct devise of such a sum for charity was illegal. The Vice-Chancellor adopted the rule laid down in *Wallgrave* v. *Tebbs,* and upheld the gift on the ground that the devisee had not assented to the testatrix's plan and that no obligation had been imposed upon him. The court, however, was in doubt about the case and refused to allow costs. Considering the confidential relation between an attorney and his client, which fact was not mentioned in the case just cited, there seems good reason for doubt. Judge FINCH characterized a gift to a solicitor for a secret and illegal purpose, as follows: "It exposes testators to the suggestion of unnecessary difficulties as inducements to the artifice of an absolute devise, concealing an illegal trust. It exposes the devisee to temptation and, even when he acts honestly, to severe and unrelenting criticism. It subserves no good or useful purpose." *O'Hara et al.* v. *Dudley, et al.,* 95 N. Y. 403. Finally, considering whether the solicitor in truth assented to the desire originally expressed by the testatrix, the question arises how could he do other than assent, or else commit a fraud? One in such a fiduciary situation, and about to be given a great sum of money, knowing at the time that the donor desired the property to be disposed of in a particular manner, would be under a duty to declare his purposes if he intended to dispose of it in a different way. If he should not be under such a duty, then what is there to prevent an unscrupulous attorney procuring similar bequests to himself upon representing the principal case to be the law and after obtaining such a gift devoting it with impunity to his own purposes?

D. L. L.